Supreme Court No. 82907-1
Court of Appeals No. 36492-1-II

SUPREME COURT
OF THE STATE OF WASHINGTON

JAKE HAWKINS

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION

Jake Hawkins, a sex offender with a history of offenses dating back to 1987, seeks review of an unpublished decision of the Court of Appeals affirming the trial court's order compelling him to submit to a polygraph examination as part of a pre-commitment psychological assessment pursuant to RCW 71.09.040(4), Washington's Sexually Violent Predator (SVP) statute. *In re the Detention of Hawkins,* 2009 WL 343153 (Wash. App. Div. 2). This Court should deny review because his case does not meet any of the criteria for review set forth in RAP 13.4(b).

II. ISSUES

1. Where sexually violent predator statute specifically mandates court-ordered evaluation by person determined qualified to conduct such an evaluation, and where a qualified expert requested a sexual history polygraph exam and provided a sworn declaration setting forth the basis for that request, did the trial court abuse its discretion by ordering Petitioner to submit to a polygraph examination as part of the statutorily-mandated psychological evaluation?

2. Where the statute calls for the Department of Social and Health Services (DSHS) to develop rules relating to the conduct of such a psychological exam, did DSHS exceed its authority by enacting WAC 388-880-034, which sets forth the responsibilities of the evaluator

who is conducting that pretrial evaluation? May the Petitioner raise this argument for the first time in this Court, when he failed to raise this issue below?

III. FACTS AND PROCEDURAL HISTORY

The State filed this SVP action on February 21, 2006, seeking the involuntary civil commitment of Mr. Hawkins as an SVP pursuant to RCW 71.09. CP at 8-9. In support of its initial petition, the State submitted a 51-page psychological evaluation of Mr. Hawkins conducted by Dr. Chris North, Ph.D., an expert with extensive experience in the evaluation and assessment of sex offenders and, more specifically, sexually violent predators. After the court found probable cause to support the State's petition, the state moved to compel a sexual history polygraph. It submitted a declaration by Dr. North, explaining in detail why such an examination was necessary. CP at 20-22. The trial court entered an order compelling Mr. Hawkins to submit to a sexual history polygraph examination. CP at 6-7.

Prior to the exam, Mr. Hawkins sought discretionary review. CP at 3. Although his motion was initially denied by the Court of Appeals commissioner, Mr. Hawkins moved to modify, and a panel granted review. In an unpublished decision, a unanimous court affirmed the trial court's order compelling Mr. Hawkins to submit to a polygraph

examination as part of a pre-commitment psychological assessment pursuant to RCW 71.09.040(4). *In re the Detention of Hawkins,* 2009 WL 343153 (Wash. App. Div. 2).

IV. REASONS WHY REVIEW SHOULD BE DENIED

Under RAP 13.4(b), Mr. Hawkins must show (1) that the Court of Appeals decision is in conflict with a decision of the Supreme Court, (2) that the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals, (3) that there is a significant question of law under the Washington or United States Constitution, or (4) that there is an issue of substantial public interest involved that should be determined by the Supreme Court. RAP 13.4(b)(1-4).

Mr. Hawkins seeks review to argue that the trial court exceeded its authority by ordering him to submit to a sexual history polygraph, and that DSHS exceeded its authority by promulgating WACs that provide for such examinations. Mr. Hawkins identifies no true conflict with prior decisions of this court and no significant question requiring review by this Court. The Court should therefore deny review.

A. The Trial Court Did Not Abuse Its Discretion By Ordering A Polygraph

Mr. Hawkins argues that the trial court was not authorized to order him to participate in a pre-trial polygraph exam as part of his mandated

evaluation under RCW 71.09.040. Because the trial court was operating pursuant to both statutory and regulatory authorization, this argument is without merit.

1. The Clear Language of the Statute and the Washington Administrative Code Anticipates A Comprehensive Evaluation Performed By An Approved Evaluator

Mr. Hawkins argues that, because the statute does not explicitly require a sexual history polygraph examination by name, RCW 71.09 "must be interpreted to prohibit" courts from ordering such examinations. Petition at 4. The statutory and regulatory framework call for a comprehensive evaluation of the offender in order to determine whether he is an SVP. The trial court's order was not an abuse of discretion.[1]

When an offender is referred to the appropriate prosecuting authority as a potential SVP, the referring agency is required to provide a "current mental health evaluation or mental health records review" of the offender. RCW 71.09.025(1)(b)(v). The reference to both an "evaluation"

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[1] A trial court's ruling on a motion to compel discovery is reviewed for an abuse of discretion. *Clarke v. Office of Attorney General*, 133 Wn. App 767, 777, 138 P.3d 144 (2006). An appellate court will find an abuse of discretion only "on a clear showing" that the court's exercise of discretion was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court's discretionary decision "is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A court's exercise of discretion is "manifestly unreasonable" if "the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'" *Id.* (quoting *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990)).

and a "records review" reflects the fact that the State, prior to initiation of the SVP action, cannot require an offender to participate in a mental health evaluation by, for example, participating in an interview. If an offender refuses to participate in an evaluation, a records review will be conducted pursuant to RCW 71.09.025 and the results of that review will be used to aid the prosecutor in determining whether an SVP action should be initiated.

However, once a court determines there is probable cause to believe the offender meets the definition of an SVP,

> the judge *shall* direct that the person be transferred to an appropriate facility *for an evaluation* as to whether the person is a sexually violent predator. The evaluation *shall* be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services [DSHS]. In adopting such rules, the department of social and health services shall consult with the department of health and the department of corrections.

RCW 71.09.040(4) (emphasis added). The statute thus requires that an evaluation related to whether the person is a sexually violent predator be performed. That exam must be performed by a qualified person pursuant to rules authorized by the statute. The declaration of Dr. North demonstrated that a proper evaluation necessarily includes a sexual history polygraph.

Interpreting the statute to allow for administration of a polygraph

examination is consistent with the statutory scheme as a whole and with this Court's interpretation of the legislative purposes. The State has a "compelling" interest both in treating sex predators and protecting society from their actions. *In re Young,* 122 Wn. 2d 1, 25, 857 P.2d 989 (1993). It is thus critical that the State be able to fully evaluate persons subject to the law. Citing the complexity of the sex predator determination, the *Young* Court rejected the argument that the 5th Amendment protected Young from being required to cooperate with a psychological evaluation:

> The problems associated with the treatment of sex offenders are well documented, and have continued to confound mental health professionals and legislators. The mental abnormalities or personality disorders involved with predatory behavior may not be immediately apparent. Thus, their cooperation with the diagnosis and treatment procedures is essential.

Id., 122 Wn. 2d at 51.

Mr. Hawkins argues that, because the statute does not specifically authorize administration of a polygraph examination by name, it must be assumed that the legislature intended to prohibit its administration. This interpretation of the statute would thwart the goal of obtaining a comprehensive examination and lead to absurd results: Under Mr. Hawkins' theory, a person "deemed qualified to conduct [a sex predator] evaluation" (RCW 71.09.040(4)) could perform such an evaluation, but he or she could not determine the component parts of that

evaluation, because the details of the evaluation are not expressly listed in the statute. Thus in Mr. Hawkins' view, absent express statutory reference to, for example, an interview or psychological testing, none could be conducted. His interpretation would effectively eviscerate the evaluation process, and in doing so would utterly thwart the compelling goal of the statute, that is, accurate identification of the sexually violent predator and protection of the community.

Mr. Hawkins also argues that, by referring to a polygraph in RCW 71.09.096(4) ("conditional release to less restrictive alternative-conditions") but not in RCW 71.09.040, the Legislature did not intend to allow the trial court to order polygraph examinations. Petition at 4-5. But the two statutory sections are not properly compared, in that they refer to different procedures. RCW 71.09.040 provides for a comprehensive psychological evaluation by a qualified professional. RCW 71.09.096, on the other hand, lists conditions that the court shall impose prior to conditionally releasing a person determined to be a sexually violent predator to the community. The fact that polygraph testing "may" be used as part of a "specific course of inpatient or outpatient treatment" does not logically imply that the trial court lacks authority to order such a test where a qualified professional deems it necessary to the statutory task of evaluating the alleged predator for commitment. Furthermore, there is no

reason why the legislature, while clearly anticipating such a test might be appropriately conducted as part of a person's supervision in the community, would have intended to prohibit administration of the same test when evaluating whether the person should be committed at all.

The requirement of a comprehensive evaluation reflects the Legislature's intent, enunciated in RCW 71.09.010,[2] to identify and address the problems created by that small group of sex offenders who, due to their high recidivism rate, specialized treatment needs, and poor prognosis for recovery, are extremely dangerous. To interpret RCW 71.09.040(4) as prohibiting a form of examination that assists qualified professionals in making precisely the assessment intended by the legislature has no basis in the statutory language and would frustrate the legislature's stated goals in enacting the statute.

2. The Discovery Order Is Consistent With Applicable DSHS Rules

DSHS has promulgated rules designed to effectuate the statute's

[2] RCW 71.09.010 provides in pertinent part as follows: "The legislature finds that a small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act, chapter 71.05 RCW... sexually violent predators generally have personality disorders and/or mental abnormalities which are unamenable to existing mental illness treatment modalities and those conditions render them likely to engage in sexually violent behavior. The legislature further finds that sex offenders' likelihood of engaging in repeat acts of predatory sexual violence is high. ...The legislature further finds that the prognosis for curing sexually violent offenders is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act."

requirement that a comprehensive post-probable cause psychological evaluation be conducted by a qualified expert. *See generally,* WAC 388-880. The evaluation mandated by RCW 71.09.090(4) must be done by a "professionally qualified person" with expertise in conducting evaluations of sex offenders (including diagnosis and assessment of re-offense risk) and providing expert testimony relating to sex offenders. WAC 388-880-010, -033.

The rule conveys the expected components of the evaluation. The evaluator is required to base the evaluation on "examination of the resident, including a forensic interview and a medical examination, if necessary." WAC 388-880-034(1). WAC 388-880-034(2)(e) makes clear that a permissible component of such a medical examination is "Medical and *physiological testing, including . . . polygraphy.*" WAC 388-880-034(2)(e) (emphasis added). If the SVP respondent "refuses to participate in examinations, forensic interviews, psychological testing or any other interviews necessary" as part of the RCW 71.09.040(4) evaluation, the State is expected to ask the court to compel the SVP respondent's compliance. WAC 388-880-035.[3]

[3] WAC 388-880-035 reads as follows: **Refusal to participate in pretrial evaluation.** If the person refuses to participate in examinations, forensic interviews, psychological testing or any other interviews necessary to conduct the initial evaluation under WAC 388-880-030(1), the evaluator must notify the SCC. The SCC will notify the prosecuting agency for potential court enforcement.

Mr. Hawkins argues that WAC 388-880-034 provides only that a polygraph examination may be reviewed if already in existence. Petition at 7-9. WAC 388-880-034 does not prohibit administration of a polygraph where appropriate, and Mr. Hawkins' argument leads to absurd results. Under Mr. Hawkins' theory, a qualified professional would be prohibited from doing anything not explicitly listed in WAC 388-880-034(1), that is, "a forensic interview and a medical examination, if necessary." Under this construction of the rule, not only would the evaluator be precluded from obtaining a polygraph exam, but any "psychological and psychiatric testing" (WAC 388-880-034(2)(d)), "medical and physiological testing" (WAC 388-880-034(2)(e)), and "other relevant and appropriate tests that are industry standard practices." WAC 388-880-034(2)(i). If Mr. Hawkins' logic is followed, the evaluator would be effectively prohibited from exercising professional judgment as to what procedures and/or testing are appropriate in the particular case. Mr. Hawkins' interpretation of the rule leads to absurd results and thwarts purposes of the statute. His strained reading does not present an issue requiring review by this Court.

3. The Trial Court's Order Is Supported By The Record

The trial court's order of a polygraph in this case was also appropriate in view of the record. There was no abuse of discretion.

In support of its motion for a sexual history polygraph as part of its pre-trial examination, the State submitted a declaration by Dr. North, a licensed psychologist who specializes in the evaluation of sex offenders, and who has worked regularly with this population since 1985. CP at 20. Dr. North has conducted approximately 500 SVP evaluations in Washington and California. CP at 20-21. He has testified approximately 100 times in SVP cases, both on behalf of the state and the defense. *Id.* at 21. Dr. North was assigned Mr. Hawkins' case by the Joint Forensic Unit, of which he has been a member since 2003.[4]

Dr. North is thoroughly familiar with the current standard of practice relating to the components that make up a comprehensive psychological evaluation of a sex offender, and, more specifically, of an offender being considered for civil commitment. CP at 21. His declaration stated that, because Mr. Hawkins had not previously undergone a complete sexual history polygraph examination, it was his professional opinion that his evaluation of Mr. Hawkins should include

[4] The panel of experts administered by the Department of Corrections and selected to conduct SVP evaluations in Washington, The End of Sentence Review Committee (ESRC), also administered by DOC, screens all potential SVP cases. CP at 25. Pursuant to RCW 71.09.025(1)(b)(v), if the ESRC determines the offender appears to meet the definition of an SVP, the DOC assigns a member of the Joint Forensic Unit to conduct an SVP evaluation of that offender. *Id.* In this case, that evaluator was Dr. North. If the State subsequently files an SVP action against an offender, the evaluator who performed the pre-filing evaluation remains on the case. *Id.* Prior to trial, that evaluator conducts the evaluation mandated by RCW 71.09.040(4) on behalf of the Department of Social and Health Services (DSHS). *Id.*

such an examination, conducted by a qualified technician. CP at 22. The results of such examinations, he indicated, are "routinely used by mental health professionals in conduction sex offender and SVP evaluations." CP at 21.[5] The questions asked during such an exam "would be designed to provide [Dr. North] with necessary and relevant information" relating to the central issues in this SVP matter, specifically: 1) whether Hawkins currently suffers from a mental abnormality or personality disorder(s); 2) whether these cause him serious difficulty controlling his sexually violent behavior; and 3) whether these make him more likely than not to commit predatory acts of sexual violence if not confined in a secure facility. *Id.*; RCW 71.09.020(16).[6] On the basis of the record before it, including consideration of the statute, SHS rules, and professional standards relied upon by experts in this field, the trial court's decision to order a polygraph was appropriate. As such, the trial court did not abuse its discretion in

[5] The use of a sexual history polygraph as part of a sex offender evaluation is endorsed by the Association for the Treatment of Sexual Abusers (ATSA). ATSA is an international organization consisting of mental health professionals who engage in evaluating and treating sex offenders. *See* http://www.atsa.com. ATSA has issued standards for evaluating sex offenders, which provide that an evaluation may include physiological assessments, including a sexual history polygraph that has been conducted according to generally accepted standards. ATSA, *Ethical Standards and Principles for the Management of Sexual Abusers*, at 14, 36-38, and 52-56 (1997). The sexual history polygraph is "a thorough examination of an abuser's lifetime sexual history. This examination is usually included as part of a comprehensive psychosexual evaluation." *Id.* at 52.

[6] In response to the State's Motion, Mr. Hawkins submitted a declaration by Dr. Richard Wollert. The declaration has not been designated as a Clerk's Paper, but is attached to Mr. Hawkins' Motion for Discretionary Review. He did not submit any legal briefing.

issuing that order.

The Petition's arguments to the contrary do not present issues that involve any conflict or significant constitutional questions. All that is left is Mr. Hawkins' interpretation of the statute and the SHS rules, which do not raise issues that meets this Court's criteria for review.

B. The Decision of the Court of Appeals Does Not Conflict With Any Decision Of This Court

Mr. Hawkins argues that review by this Court is merited due to the Court of Appeals' reference to CR 26(a) as an alternate basis for upholding the trial court's decision and that, as such, it is in conflict with this Court's decision in *In re Detention of Williams,* 147 Wn. 2d 476, 55 P.3d 597 (2002). Petition at 5. This argument should be rejected for several reasons: First, the Court of Appeals offered an independent basis for its ruling and CR 26(a) is not a substantive part of that ruling. The sentence cited ("Furthermore, as the State argues, SVP actions are civil in nature and thus CR 26(a) provides an additional basis for 'physical and mental examinations' ordered by the trial court." Slip. Op. at 2.) is wedged between two longer sections, each discussing the regulatory or statutory authority for the ordering of a polygraph examination. *Id.* In its ultimate holding, the court makes no reference whatsoever to CR 26, stating simply that "Chapter 71.09 RCW and chapter 388-880 WAC allow

for polygraph examinations in the case of a potential SVP. RCW 71.09.040(4); WAC 388-880-030(1),-034. Therefore, the trial court did not abuse its discretion and Hawkins's argument fails." Slip Op at 2.

In context, the reference to CR 26(a) references an argument put forward by the State, rather than one relied upon by the Court of Appeals in formulating its opinion. The CR 26(a) argument was not made to the trial court (*see* CP at 13-19), nor was CR 26(a) relied upon by the trial court in reaching its ruling. CP at 6-7.

The question before this Court is whether the Court of Appeals' determination that the trial court did not abuse its discretion is appropriate for review under any of the criteria set forth in RAP 13.4. The passing reference to CR 26(a) is not critical to the decision and thus cannot create any conflict that would form the basis for review under RAP 13.4.

C. The Department of Social and Health Services Did Not Exceed Its Authority When It Promulgated WAC 388-880-035

Mr. Hawkins argues that "the statute does not authorize DSHS to develop rules regarding the conduct of pretrial evaluations," and that the authority of DSHS to develop rules is limited to rules relating to the professional qualifications of persons conducting those evaluations. Petition at 11. For the reasons set forth below, his argument should be rejected.

1. Mr. Hawkins Should Not be Permitted to Argue Lack of Authority for the First Time on Appeal

RAP 2.5(a) states that the appellate court may refuse to review any claim of error that was not raised in the trial court. The rule does, however, specifically permit a party to raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. *Id.* Aside from these exceptions, the general rule is that appellate courts will not consider issues raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (citing RAP 2.5(a)). Ordinarily, the appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The rule reflects a policy of encouraging the efficient use of judicial resources. *Id.* Therefore, exceptions to the rule requiring objections at trial to preserve issues for appeal must be construed narrowly. *Kirkman*, 159 Wn.2d at 934-35 (*citing* ***Scott***, 110 Wn.2d at 682).

Here, Mr. Hawkins made no argument regarding the validity of WAC 388-880-034 to the trial court. Likewise, he failed to make the argument in the motion for discretionary review he filed with the Court of

Appeals, instead raising this issue for the first time after the Court of Appeals had granted his motion to modify and accepted review. The issue he now raises was available to be argued to the trial court. By failing to raise this challenge to the rule at the superior court, the challenge is flawed. Mr. Hawkins did not join DSHS—the rulemaking agency—as a party nor properly attempted to review the rule and record under the provisions for addressing rule validity of the Administrative Procedures Act, RCW 34.05.[7] *See Judd v. Am. Tel. & Tel. Co.*, 152 Wn.2d 195, 204-05, 95 P.3d 337 (2004).

Because the question of the validity of the rule is not properly raised, and the agency that adopted the rule is not a party, Mr. Hawkins' challenge to the rule validity does not meet the criteria of RAP 13.4(b).

2. The Question of Whether DSHS Acted Within Its Authority In Promulgating WAC 388-880-034 Does Not Merit Review

Even if this Court permits Mr. Hawkins to raise this issue at this juncture, it should be rejected on its merits, in that DSHS acted within its authority by promulgating rules relating to the conduct of pre-trial SVP evaluations. Administrative agencies have those powers expressly granted to them and those necessarily implied from their statutory delegation of

[7] RCW 34.05.570(2)(a) provides as follows: A rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection or in the context of any other review proceeding under this section. In an action challenging the validity of a rule, the agency shall be made a party to the proceeding

authority. *Tuerk v. Dep't of Licensing,* 123 Wn.2d 120, 124-25, 864 P.2d 1382 (1994). Agencies also have implied authority to carry out their legislative mandated purposes. *Id.* at 125. When a power is granted to an agency, "everything lawful and necessary to the effectual execution of the power" is also granted by implication of law. *Id.* (quoting *State ex rel. Puget Sound Navigation Co. v. Dep't of Transp.,* 33 Wn.2d 448, 481 206 P.2d 456 (1949)). Implied authority is found where an agency is charged with a specific duty, but the means of accomplishing that duty are not set forth by the Legislature. *Id.*

Here, RCW 71.09.040(4) states that the sexual predator evaluation "shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the Department of Social and Health Services." The legislature charged DSHS with the duty of overseeing these evaluations, and left that agency with the power to determine the means of how to conduct these examinations. This power to determine the specifics involved in conducting pretrial SVP evaluations is necessarily implied from the statutory delegation of authority given to DSHS by the Legislature. Given the importance of polygraph results in the field of psychological evaluations, the mere requirement that the evaluator review any pertinent polygraph information that may exist is appropriate. Because

WAC 388-880-034 is a valid exercise of authority granted to DSHS by the Legislature, there is no basis for review by this Court.

V. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court deny Mr. Hawkins' Petition for Review.

RESPECTFULLY SUBMITTED this 1st day of May, 2009.

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NO. 82907-1

WASHINGTON STATE SUPREME COURT

In re the Detention of:

Jake Hawkins,

Appellant/Petitioner

DECLARATION OF SERVICE

I, Kelly Hadsell, declare as follows:

On May 1, 2009, I deposited in the United States mail true and correct cop(ies) of Response To Petition For Review and Declaration of Service, postage affixed, addressed as follows:

Manek Mistry and Jodi Backlund
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 1st day of May, 2009, at Seattle, Washington.

KELLY HADSELL
Legal Assistant

OFFICE RECEPTIONIST, CLERK

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Cc: Sappington, Sarah (ATG)
Subject: RE: In re the Detention of Jake Hawkins

Rec. 5-1-09

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In re the Detention of Jake Hawkins, No. 82907-1

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Thank you kindly,

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